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May 4, 2021

Via ECF

Honorable Gabriel W. Gorenstein
United States Magistrate Judge
Southern District of New York
500 Pearl St., Courtroom 6B
New York, NY 10007

MEMORANDUM ENDORSEMENT

Re: *Diaz v. New York Paving, Inc.*
Docket No. 18 Civ. 4910 (ALC)(GWG)
MLGB File No.: 09676-00110

Dear Judge Gorenstein:

This firm represents Defendant New York Paving, Inc. ("Defendant") in the above-referenced matter. We write in connection with Your Honor's Orders dated February 17, 2021 (**ECF No. 179**) and February 24, 2021 (**ECF No. 183**) to inform the Court that Mr. Vito Smith Jr. and Mr. Jonathan Oliver failed to appear for their court ordered depositions. As such we respectfully request the Court dismiss both Messrs. Smith Oliver's claims with prejudice as a sanction for not complying with Your Honor's Orders compelling depositions pursuant to Federal Rule of Civil Procedure, Rule 37(b)(2)(A).¹

As this Court is aware, on February 17, 2021, Your Honor granted Defendant's motion to compel the deposition of an Opt-In Plaintiff Vito Smith, Jr.² Shortly thereafter, on February 24, 2021, Your Honor also granted Defendant's motion to compel the deposition of Opt-In Plaintiff Jonathan Oliver – which Ordered Mr. Oliver to appear for a deposition within thirty (30) days (*i.e.*, by March 26, 2021).³ Upon receiving the Order, on February 25, 2021, Defendant requested dates of availability for both Messrs. Smith and Oliver for their respective depositions. Plaintiff failed to provide dates for same after two requests. Subsequently, the parties participated in a "meet and confer" on March 17, 2021 to discuss, amongst other items, Mr. Smith's and Mr. Oliver's

¹ The parties participated in multiple meet and confers since the Court's Order compelling Messrs. Oliver's and Smith's depositions. Most recently Plaintiff's counsel confirmed the parties' are at impasse with respect to same on April 22, 2021. During this meet and confer, Steven Wittels, Steven Cohen, Russell Busch and Jessica Hunter appeared on behalf of Plaintiffs and Christopher Hampton and Nicholas Melito appeared on behalf of Defendant. The meet and confer lasted approximately one (1) hour.

² See **ECF No. 179**.

³ See **ECF No. 183**.

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availability.⁴ During said “meet and confer,” Plaintiff’s counsel informed Defendant that their position with respect to Mr. Smith and Mr. Oliver remained unchanged, and, thus, neither Opt-In Plaintiff will be appearing for their respective deposition. As such, Defendant informed Plaintiff’s counsel that we were at impasse and would be moving the Court to dismiss both Mr. Smith and Mr. Oliver from the instant action once the March 26th deadline passed. To date, Mr. Smith and Mr. Oliver not only failed to appear for a deposition, but also failed to even attempt to schedule same.

Based on the foregoing, and in accordance with Your Honor’s Order⁵, Defendant respectfully requests this Court dismiss Messrs. Smith and Oliver from this action *with* prejudice. *See Scott v. Chipotle Mexican Grill, Inc.*, No. 12 Civ. 08333 (ALC)(SN), [2015 WL 13745760](#), at *10 (S.D.N.Y. July 31, 2015) (dismissing 66 opt-in plaintiffs’ claims with prejudice for failing to participate in discovery); *see also Ruiz v. Citibank, N.A.*, Nos. 10 Civ. 5950 (KPF)(RLE), 10 Civ. 7304 (KPF)(RLE), [2014 WL 4635575](#), at *6 (S.D.N.Y. Aug. 19, 2014) (dismissing opt-in plaintiffs’ claims with prejudice for failing to participate in discovery).

We thank Your Honor for your time and consideration of the foregoing request.

Respectfully submitted,

/s/ Nicholas P. Melito
Nicholas P. Melito, Esq.

cc: All Counsel of Record (via ECF)

Any motion to dismiss a party is returnable before Judge Carter. Any such motion shall be filed following the completion of discovery and at the time summary judgment motions are due.

So Ordered.


GABRIEL W. GORENSTEIN
United States Magistrate Judge
May 11, 2021

⁴ Mr. Steven Wittels and Mr. Russell Busch appeared on behalf of Plaintiffs and Mr. Nicholas Melito appeared on behalf of Defendant. The “meet and confer” lasted approximately forty-five (45) minutes.

⁵ *See ECF No. 183* (“Accordingly, NY Paving’s motion to compel Oliver’s deposition ([Docket # 170](#)) is granted. Oliver must appear for a deposition within 30 days of this Order. If he fails to appear without having shown good cause, he will likely be dismissed as a party.”).